Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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LINDA ABRAMOWITZ and VICTOR ABRAMOWITZ,

Index No.: 710173/16

Plaintiff(s),

Motion Date: 10/5/21

- against -

Motion Cal. No.: 2

Motion Seq. No.: 03

STEPHEN P. ESPOSITO, M.D., P.C., and
S&D REALTY OF NY, INC.,

Defendant(s).
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The following papers numbered 1 - 4 read on this motion by defendants, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	Not Considered
Reply Affirmation-Exhibits-Service.....	Not Considered

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

This personal injury action arises from an alleged trip-and-fall accident that occurred on October 29, 2015 at the entryway to the building located at 26-19 Francis Lewis Boulevard, County of Queens, City and State of New York. It is undisputed that Stephen P. Esposito, M.D. is the sole owner of corporate defendants Stephen P. Esposito, M.D., P.C. and S&D Realty of NY, Inc., the latter of which owns the building out of which Dr. Esposito runs his medical practice. Plaintiff Linda Abramowitz alleges that she tripped and fell as she descended the single-step riser/threshold extension to the building, which leads to the public sidewalk. Her husband, plaintiff Victor Abramowitz, asserts a cause of action for loss of spousal services, society, and consortium.

Defendants now move for summary judgment dismissing the complaint. Summary judgment is a drastic remedy that will be granted only if the movant has demonstrated, through submission of

evidence in admissible form, the absence of any material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and has affirmatively established the merit of his or her cause of action or defense (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]). A failure to make a *prima facie* showing of entitlement to judgment as a matter of law "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a movant makes the *prima facie* showing, the burden then shifts to the non-movant to raise a material issue of fact requiring a trial (see id). Courts must view the evidence in the light most favorable to the non-movant (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and draw all reasonable inferences in his or her favor (*see Haymon v Pettit*, 9 NY3d 324, 327, n* [2007]).

Defendants argue, *inter alia*, that they are entitled to summary judgment because the entryway constituted an open and obvious condition that was not inherently dangerous, and their building was in compliance with the applicable provisions of 1938 Building Code of the City of New York, which, they insist, governs, rather than the 1968 code invoked by plaintiffs. The court need not wrestle with these arguments because, as discussed below, resolution of a threshold issue suffices to dispose of the motion.

Defendants also argue that plaintiffs have not identified the allegedly dangerous condition or defect which caused Mrs. Abramowitz's accident. It is well-settled that,

> "[o]rdinarily, a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it"

(*Goldberg v Vil. of Mount Kisco*, 125 AD3d 929, 929 [2d Dept 2015] [internal citations and quotation marks omitted]). However, "[a] defendant moving for summary judgment in a slip-and-fall case is not obliged to demonstrate lack of notice if it can prevail on another ground" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 83 [2015]). As the Second Department explains,

> "a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation. Where it is just as likely that some other factor, such as a misstep or a loss of balance could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation"

(*Goldberg*, 125 AD3d at 929-930 [internal citations and quotation marks omitted]). Hence, "[a] plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Madden v 3240 Henry Hudson Parkway, LLC*, 192 AD3d 1095, 1096 [2d Dept 2021]).

In support of summary judgment, defendants submit, *inter alia*, certified transcripts of the depositions of both plaintiffs and of non-party witness Leko Quni. Plaintiff Mrs. Abramowitz testified that during her visit to Dr. Esposito's office, she went outside for some fresh air, and tripped as she descended the building's one-step threshold entryway. Before the date of the accident, Mrs. Abramowitz had treated there with Dr. Esposito for nearly a decade, visiting twice a year, but she had never had any difficulty walking into or out of the building, nor was she aware of any prior accidents at the entryway. Mrs. Abramowitz also testified that she did not observe cracks, dirt, debris, or refuse on the entryway step, and she did not know what caused her to trip and fall to the ground. Mr. Abramowitz, who did not witness the accident, testified that when he responded to the scene approximately 10 minutes thereafter, his wife stated that she "fell off" the entryway step, but she did not say what caused her to fall. Mr. Quni testified that he worked at the pizza parlor next door, and on the date of the accident, he saw a woman fall down near the building entrance, but she had just returned from across the street and was walking on the sidewalk when she fell right in front of the adjacent bus stop.

The court finds that defendants have made a *prima facie* showing of entitlement to summary judgment on the ground that plaintiffs cannot identify the cause of Mrs. Abramowitz's fall without resorting to speculation. As noted above, Mrs. Abramowitz expressly disavowed the presence of any cracks, dirt, debris, or refuse on the entryway, nor did she attribute he accident to any other physical conditions, transient or otherwise. That Mrs. Abramowitz and Mr. Quni differed as to exactly where she fell is not a material factual issue which precludes summary judgment. Regardless of whose account is accurate, the record makes clear that plaintiffs simply do not know what caused Mrs. Abramowitz to fall. Hence, on this record, it is "just as likely" that Mrs. Abramowitz tripped and fell due to "some other factor, such as a misstep or a loss of balance" (*see Goldberg*, 125 AD3d at 929-930). Whether the accident occurred on the premises owned and operated by defendants, or on the abutting public sidewalk which they may have also been responsible to maintain (*see* Administrative Code of the City of New York § 7-210), is therefore immaterial (*see e.g. Theard v G. Fazio Constr. Co., Inc.*, 192 AD3d 942, 943-944 [2d Dept 2021] [defendants awarded summary judgment where plaintiff could not identify the cause of the decedent's trip-and-fall on the sidewalk

abutting defendants' premises]; *Von Euw v Frisco, LLC*, 185 AD3d 872, 873 [2d Dept 2020] [same, where plaintiff could not identify what caused her to slip and fall inside defendants' restaurant]). In light of this unrebutted showing, the court finds that defendants are entitled to summary judgment, dismissing the complaint.

The court did not consider plaintiffs' opposing papers, or the moving defendants' reply papers. Effective February 1, 2021, the Uniform Civil Rules for the Supreme Court and the County Court impose word count limits for affidavits, affirmations, briefs, and memoranda of law submitted on all motions (*see generally* 22 NYCRR § 202.8-b [a]). Said documents comprising the moving papers "in chief" are limited to 7,200 words each, while those comprising the other motion papers are limited to 4,200 words each (*see* 22 NYCRR § 202.8-b [a]). The certification appended to plaintiffs' affirmation in opposition indicates that the document contains a total of 7,277 words, which exceeds either limit set by the rule, and the court has no record of plaintiffs having requested permission for an oversized submission (*see* 22 NYCRR § 202.8-b [d]). In contrast, defendants' reply papers do not contain a word count certification at all. Due to the parties' respective violations of the rule, the court did not consider the defective affirmations, nor the exhibits appended thereto. It is also noted that plaintiffs did not submit a response to defendants' statement of material facts, and the rules now provide that such a failure by the non-movant will result in the court deeming the non-movant to have admitted to each of the factual allegations as set forth in the movant's statement (*see* 22 NYCRR § 202.8-g)

Accordingly, the above-referenced motion by defendants for summary judgment dismissing the complaint is **GRANTED.**

The foregoing shall constitute the decision and order of this court.

Dated: November 18, 2021

JANICE A. TAYLOR, J.S.C.

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